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## SOME PUBLIC REACTIONS TO PROCEDURAL METHODS

MICHAEL L. FANSLER\*

Your President has indicated that I am to deliver an address, but, since I have no prepared manuscript, what I have to say is better characterized perhaps as a discussion. The subject is highly important to the legal profession, and I discuss it as a member of the profession and not as a judicial officer.

The principal business of our profession is to assist and participate in the administration of justice. Ours is a government of law and not a government of men. The laws which govern us are administered and enforced by free and independent courts. The members of our profession are officers of the courts, charged with the responsibility and duty of assisting the courts in administering justice.

Reference is frequently made to the inherent powers of the courts, but we recognize that, in strictness, courts have no inherent powers. The courts and our whole legal system exist only at the will of the sovereign. The courts have such powers only as have been delegated to them by the sovereign—in this country the sovereign people. The existence of our profession as we have practiced it is dependent upon a system of courts and laws as they have existed in this country at the will of the sovereign, and it is well therefore that

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\* An address delivered by Judge Michael L. Fansler of the Indiana Supreme Court at the mid-winter meeting of the Indiana State Bar Association, January 25, 1941.

the profession and all who are interested in the profession take stock occasionally to see how our credit is, and how we and our system are regarded by the sovereign people.

Unless we do the tasks that have been assigned to us reasonably well, unless through the efforts of the bench and bar the courts are operated in a manner satisfactory to the public, it is only reasonable to assume that the powers and authority delegated to the courts may be withdrawn. The successful operation of a government of laws must of necessity depend upon the efforts of the members of our profession upon the bench and at the bar. If with their trained skill the system cannot be made to work successfully and satisfactorily, it surely cannot be expected to function in the hands of the unskilled, and so a sufficient degree of public dissatisfaction and impatience with the manner in which we do our tasks might possibly result in the substitution of a government of men for a government of laws. This would be no innovation in the world today, where only a few people have the privilege of appealing to independent courts through members of the legal profession, free to assert the legal rights of their clients even against the claims and contentions of the government.

So it is important to know: Are we in good repute? Is our service satisfactory to the public? There is much evidence—some positive and much negative evidence—that, in so far as the substantive law is concerned, the service has been satisfactory. At least there has been but little complaint. The substantive law to which I refer is the common law as it has been interpreted by the bench with the assistance of the bar as distinguished from substantive statutory law. There may be some evidence of occasional dissatisfaction in isolated cases of controversy between individuals and the government, but, on the whole, and in so far as the interpretation of the substantive law involves the rights of men among themselves, it seems safe to say that the evidence strongly indicates that the task has been performed to the satisfaction of the sovereign.

But not so of procedural methods—the adjective law. There is ample evidence that down through the ages there has been dissatisfaction with our profession and with the courts in their administration of the law. Literature rec-

ords complaints about the law's delay as early as two thousand years ago. But it is not only delay that has given rise to criticism. At times it has been believed that controversy concerning technical procedural rules has absorbed the attention of the bench and bar to the exclusion of the merits of causes. It has been suspected that litigation has been made a game in which skill in technicalities was given more consideration than the substantive rights of the parties, and in which the result was controlled too often by the ability of counsel rather than the merits of the case.

It cannot be disputed that our profession and the courts are designed to perform a service, and not to play a game of skill for our own amusement or edification. Difficult questions involving fine distinctions give rise to justifiable controversy and contention concerning questions of substantive law, but perhaps too often we are inclined to carry the controversy, the fine distinctions, the matching of skill, into the mere rules designed as an aid to a determination of the controversies concerning the substantive questions. The layman quite properly considers that rules of procedure are designed and intended merely to expedite the determination of causes upon their merits, and, when the case is finally disposed of upon some question of procedure, it is some times thought that in the controversy concerning the operation of the machinery of justice the profession has lost sight of the necessity of administering justice.

Public reaction has not always resulted in condemnation of the system. There is evidence of a realization that the courts and the profession have endeavored to construct procedural machinery that will expedite decisions upon the merits. Quite often the public mind has indicted not the profession as a whole, nor the courts, nor even the rules of procedure, but only certain ones in the profession, certain practitioners of the law that the public considers as having sought to pervert the proper purposes and ends of procedural law to the defeat of justice. In the Supreme Court Law Library I came across "The History and Practice of Civil Actions," by Lord Chief Baron Gilbert, printed in London in 1779. I quote from the preface:

"At the Institution of the Court of Common Pleas, (as well as of all other Courts of Justice) there was established

a sure Method or Form of Practice, whereby the Procedure of the Plea should be conducted till it met with a final Determination: This Method' or Form of Practice, however consonant to the Rules of Justice, was not altogether free from Inconveniences; for by the artful Contrivances of evil-disposed Persons, the Authority of the Court was too often turned to Oppression, and its Indulgences to Delay and Vexation: This obliged the Justices of the Court to regulate and amend the Practice in many Points, as they saw Occasion; nay, even the Legislature have sometimes been forced to interpose their Authority to put a Stop to and remedy such Mischiefs as occurred in the Practice."

You will note the words, "a sure Method or Form of Practice." From the beginning there was an effort to make the practice simple and sure and beyond controversy, but it seems that the ingenuity of lawyers will not permit. Lately there has been much discussion of what is said to be the inherent powers of courts in relation to rule making and procedural methods. Perhaps there is room for controversy—the kind of controversy that makes the public impatient with us. And still we know that some controversy is unavoidable. We must have rules and they must to a degree be adhered to, and still it is apparent from the evidence that if the controversy is carried to what the public considers unreasonable lengths, our good relations with the public suffer and there is impatience with the courts for permitting it and with the profession for persisting in it. It has often been supposed that our rules of practice and procedure had grown up gradually; that they developed with the common law in England; that they were announced and declared by the courts; and largely this is true. But in the quotation from which I read, which deals with procedure from the very beginning, it seems to have been recognized that the Legislature perhaps has some authority in respect to procedure.

It all depends, of course, upon what powers the court had from the sovereign. Anciently it seems to have been thought that the Legislature had some power from the king to regulate the rules of practice, but through it all there seems evident a feeling that primarily it should be left to the courts. Perhaps it was thought that they were better

equipped to do it, but that if they did not do it satisfactorily the Legislature might intervene.

At the time of the preparation of our present Constitution in 1851 the relations of our profession to the sovereign public were not very good. I think it may be said that our public relations were bad. In the Constitutional Convention an article was proposed providing for the simplification of the practice in courts, doing away with the distinctions between law and equity, doing away with common-law forms, and providing that any voter of good moral character could practice law. They were proposed as one item at first, but afterwards the provision concerning the practice was separated. From the debates we note that the lay public believed that the few well-trained, well-educated, and skillful lawyers were able by technical procedural means to out-manuever the average lawyer in the courts to such a degree that that which seemed obviously just and fair and reasonable was defeated and justice denied. So they were going to change all of that. They were going to make the practice simple and sure, just as anciently it was intended that there should be a sure way. There were long and vigorous debates. The older and more seasoned lawyers resisted vigorously. They contended that the rules of practice were clear and simple; that they were just misunderstood. During the debates one member said: "A more ridiculous system for the administration of justice never was devised by man or men, than the system of the practice of the common law of England, and of the United States. (Applause) \* \* \* \* \* There is no necessity for this at all; and I would swap the whole of these absurdities away, and open the road to the pure fountains of justice so plain, that 'a way-faring man, though a fool, need not err therein.'" To illustrate the unreasonableness of the forms of action, he said: "A shall go to B and steal his watch from under his pillow, or take it out of his pocket, and run away with it. All of you would say that he had stolen the watch; but the common law says that B may waive the tort, and sue A in an action of assumpsit. In such a case, his declaration would be to this effect: 'I, B, complain of A, that I sold him a watch of the value of a hundred dollars, and he refuses to pay for it, and I want a judgment,' &c. This is the practice, and B may recover in such a suit. But what does

A say in reply? He comes into court and pleads "non- assumpsit"—that is, that he did not undertake to pay for the watch. Now look at the position in which our mode of practice places these parties. Everything that the thief has said is true, while everything that the plaintiff has said is a lie. That is the fact. The plaintiff is compelled to tell a lie, and the man who has committed the felony tells the truth." There was great applause and cheering. Senator Kelso undertook to explain that they misunderstood it all. But somehow the sovereign people as there represented did not think they misunderstood. They thought it absurd and unreasonable and they wanted it changed.

Now, prefacing his remarks, the speaker above referred to had said: "I do not undertake to repudiate the pure principles of the common law. I am not for abrogating that law which is a protection to us all. It is not the spirit nor the policy of the law, which is our security while awake and asleep \* \* \* \* \* that I would seek to change. I would not touch one scintilla of that law; but I would make the road to the court of justice open and plain, through which all may see the object before them, and upon which all may travel with unerring certainty and safety." They were satisfied with the substantive law, but they were highly dissatisfied and impatient with procedural methods, and they intended that they should be corrected.

Not long ago there was a bill, known, I believe, as the Logan-Walter bill, pending in Congress. As I understand it, the bill dealt with procedure by which the courts might review or scrutinize the acts of administrative boards to discover whether they had acted lawfully. Now, there seems nothing new in this, that is, in the jurisdiction of courts to scrutinize the acts of ministerial bodies to see that they have acted within their jurisdiction, and, as I understand it, the bill dealt merely with procedure. The bill was passed by a small margin, and was vetoed by the President. The objection urged to it in the Congress, and by the President, was that lawyers representing certain interests would, through delay made possible by procedural methods in the courts, so delay the activities of the ministerial boards and commissions involved that it would in effect sabotage their work and destroy their usefulness. Isn't that what they were saying in

the preface to the old book upon the history of procedure? "The artful Contrivances of evil-disposed Persons." Not a direct condemnation of courts or of the rules of procedure, but a mistrust of the efficacy of the rules to accomplish prompt decisions upon the merits; somehow an acknowledgment that the courts and the profession intended well by their procedural rules, but had been unable to guard against abuses destructive of substantive rights. What the effect of the defeat of this bill may be, I do not know, but it is an indication of a willingness to deprive courts of a jurisdiction which concededly should be theirs, because of failure or inability of the courts and the legal profession to provide machinery for the exercise of the jurisdiction adequate to protect the public interests.

Immediately after the adoption of our Constitution a Code was adopted, and for several decades the decisions of our courts were taken up largely with controversies concerning the proper interpretation of the Code—about how the machinery for deciding the controversy was to be worked, and very little about the controversy itself. We lawyers know that when rules are being changed, always in a good-faith effort to improve and simplify them, some controversy is unavoidable, but need we carry these controversies to the point where they threaten to destroy or to impair confidence in the institution which the rules are designed to serve? I don't think controversy need be, or will be, carried to that extent. It never has been, although it has, as we have seen, bred dissatisfaction and lack of confidence. Whenever dissatisfaction is too great, whenever the sovereign public believes that these lawyers have too much controversy among themselves about the manner in which the public is to be served, the sovereign may turn to what it may consider the lesser of evils, and entrust the work to administrative boards in the hope that they will do it more promptly and will get directly to the merits.

Now, waiving the controversy about where the power lies, the jurisdiction to make rules of practice, it is clear that good public relations require that we do have efficient rules that will procure a result that is satisfactory to the sovereign people; that there shall not be tedious delays or too much controversy about how we shall proceed; that "evil-



disposed Persons" may not be able to prostitute the rules to the defeat of justice.

If there be room for controversy about where the sovereign has vested jurisdiction to do something about it, there can be no controversy about the objective sought by the sovereign, and Legislatures have never been too jealous of their prerogatives in this respect. In our Constitutional Convention there was no debate as to whether the rule-making power should vest in the courts or in the Legislature. That subject was not discussed. The debate concerned itself with the necessity for improving the rules, and, secondarily, with whether the Legislature should draft the rules directly or through the agency of a commission. The constitutional provision finally determined upon is vague as to whether the commission itself should make the rules or merely recommend, but the Legislature avoided any difficulty by adopting the Code which was recommended as a statute. It is interesting to note that in another part of the Constitution we find a prohibition against local laws respecting practice in the courts, a circumstance which tends to support the inference that the Constitution makers understood that the Legislature was to have power to pass general laws respecting the subject-matter.

All of this is, and has been, a subject of interesting speculation and discussion, if not of controversy, but I am not now interested in a solution. What I am seeking to suggest is that our proneness to controversy about such matters has not helped our relations with the public. Legislatures are not asserting or standing upon their authority. On the contrary they seem to feel that the courts and the profession are better able to make the rules, and are willing to abdicate such authority as they may have in the premises, as, witness, the recent Acts of Congress and of our own Legislature.

Now, what to do about it? How to maintain good relations with our sovereign public? Further controversy will not help, nor changes in the rules of procedure, if it is to lead to further confusion. Since we have been credited always with an effort to improve procedure, let us so conduct ourselves as a whole that we shall be entitled to credit for making our procedure work better. As a practical matter,

much progress can be made by curbing those "evil-disposed Persons" who seek to pervert the rules in order to defeat justice. But there is difficulty in this, since all insistence upon technical rules may not be condemned as evil. But if the influence of the profession is exerted in a united effort to discourage the insistence upon technicalities for their own sake; if the ability and skill of our profession are thought better employed in seeking to prevail upon the merits of causes, it will be helpful. I bring no answer to the problem, but if courts and lawyers will continually and ever strive towards minimizing delay and the avoidance of technical controversy which tends to defeat prompt disposition of causes upon the merits, it will be a step in the right direction.